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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Chris Kohler, ) CV 11-4451 RSWL (SPx)  
Plaintiff, )  
vs. ) **ORDER Re:** Plaintiff's  
Bed Bath & Beyond of ) Motion for Summary  
California, LLC, et. al ) Judgment, or Partial  
Defendants. ) Summary Judgment in the  
 ) Alternative, Against  
 ) Defendant Bed Bath &  
 ) Beyond of California,  
 ) LLC [48], and Cross-  
 ) Motion for Summary  
 ) Judgment of Defendant  
 ) Bed Bath & Beyond of  
 ) California Limited  
 ) Liability Company [57]  
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On July 19, 2012, Plaintiff Chris Kohler's ("Plaintiff") Motion for Summary Judgment, or Partial Summary Judgment in the Alternative, Against Defendant Bed Bath & Beyond of California, LLC [48] and Defendant Bed Bath & Beyond of California, LLC's ("Defendant") Cross-Motion for Summary Judgment of Defendant Bed Bath & Beyond of California Limited Liability Company [57] came on for regular calendar before the Court. The

1 Court having reviewed all papers submitted pertaining  
2 to these Motions and having considered all arguments  
3 presented to the Court, **NOW FINDS AND RULES AS FOLLOWS:**

4 As a preliminary matter, the Court **OVERRULES**  
5 Plaintiff's Evidentiary Objections and **DENIES**  
6 Defendant's Requests for Judicial Notice. The Court  
7 hereby **DENIES** Plaintiff's Motion for Summary Judgment.  
8 The Court **GRANTS** Defendant's Cross-Motion for Summary  
9 Judgment as it relates to Plaintiff's federal Americans  
10 with Disabilities Act ("ADA") claims. Accordingly, the  
11 Court **DISMISSES without prejudice** Plaintiff's remaining  
12 state law claims.

13 **I. BACKGROUND**

14 Plaintiff is physically disabled and uses a  
15 wheelchair to get around. On May 24, 2011, Plaintiff  
16 brought suit against various retail and restaurant  
17 establishments located in the Lake Elsinore  
18 Marketplace, a shopping center located in Lake  
19 Elsinore, California. In his Complaint, Plaintiff  
20 alleges that the establishments violated the ADA as  
21 well as two California state statutes, the Unruh Civil  
22 Rights Act ("Unruh Act") and the California Disabled  
23 Persons Act ("CDPA") [1]. With the exception of  
24 Defendant Bed Bath & Beyond, all other Defendants named  
25 in the Complaint have been dismissed from this Action.

26 Plaintiff alleges that during three visits to  
27 Defendant's Lake Elsinore, California location he was  
28 denied full and equal access because of his disability.

1 Plaintiff's last visit was on May 16, 2012. The  
2 specific violations of the ADA and state law that  
3 Plaintiff alleges against Defendant are as follows:

4

5 - The slope and cross slopes of disabled parking  
6 spaces exceed the two percent requirement under ADA  
7 regulations

8 - The slope and cross slopes of access aisles in the  
9 parking lot exceed the two percent requirement  
10 under ADA regulations

11 - The bathroom stall door is not self-closing

12 - The strike side<sup>1</sup> clearance when entering the men's  
13 restroom is insufficient

14 - The front roll of toilet paper is more than twelve  
15 inches from the front of the toilet

16 - The operable part of the paper towel dispenser is  
17 mounted too high

18 - The paper towel dispenser requires pinching,  
19 twisting, or grasping to operate

20 - The pipes beneath the sink in the men's restroom  
21 are not properly insulated

22 - The strike side clearance when exiting the men's  
23 restroom is insufficient

24 **II. LEGAL STANDARD**

25 Summary judgment is appropriate when the pleadings,

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27 <sup>1</sup> When referring to doors, the strike side is the  
28 side on which the door opens, opposite the hinges.

1 affidavits, and other supporting papers demonstrate  
2 that there are no genuine issues of material fact, and  
3 the moving party is entitled to prevail as a matter of  
4 law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett,  
5 477 U.S. 317, 322 (1986). When making this  
6 determination, the Court must view the record in the  
7 light most favorable to the non-moving party. Anderson  
8 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A  
9 "genuine" dispute is one that is supported by evidence  
10 sufficient to permit a reasonable jury to find in favor  
11 of the nonmoving party. Id. at 247-48.

12 **III. ANALYSIS**

13       **A. Evidentiary Objections**

14       As a preliminary matter, the Court evaluates  
15 Plaintiff's Evidentiary Objections to three  
16 Declarations submitted by Defendant.

17       First, the Court **OVERRULES** Plaintiff's objections  
18 to the Declaration of Dustin Jaggli ("Jaggli Decl.")  
19 and **OVERRULES** Plaintiff's objections to the Declaration  
20 of Steve Cerda ("Steve Cerda"). The Court finds that  
21 Defendant's non-disclosure of both Jaggli and Cerda  
22 prior to the filing of the instant Motions was  
23 substantially justified. Fed. R. Civ. P. 37(c)(1).  
24 Accordingly, exclusion of their Declarations in the  
25 instant Motions is unwarranted.

26       In addition, the Court **OVERRULES** Plaintiff's  
27 objections to the Declaration of Larry Wood ("Wood  
28 Decl."). Plaintiff objected to the Wood Declaration on

1 the grounds that the Declaration is a sham and that  
2 Wood is an undisclosed witness. However, the Court  
3 finds that Defendant promptly corrected and adequately  
4 explained the error regarding the date on the signature  
5 page of the Declaration. Furthermore, Defendant was  
6 not required to disclose Wood as an expert witness  
7 prior to the filing of the instant Motions. The  
8 deadline to disclose expert witnesses had not yet  
9 passed. Fed. R. Civ. P. 26(a)(2)(D) (deadline to  
10 disclose experts is 90 days before trial).

11       **B. Requests for Judicial Notice**

12       As an additional preliminary matter, the Court  
13 **DENIES** Defendant's Requests for Judicial Notice of  
14 filings and documents related to two other Central  
15 District cases.

16       **C. Plaintiff's Standing Under the ADA**

17       The main issue in Plaintiff's Motion and  
18 Defendant's Cross-Motion surrounds the existence of  
19 alleged barriers that violate the ADA. However,  
20 Defendant has also argued that Plaintiff lacks standing  
21 under the ADA because he has failed to adequately  
22 allege injury-in-fact. Specifically, Defendant  
23 contends that Plaintiff has not alleged that he was  
24 actually prevented from making full use of Defendant's  
25 facility. Since adequately alleging injury-in-fact is  
26 constitutionally required, the Court will first address  
27 Plaintiff's standing in this case.

28       In order to have constitutional standing, Plaintiff

1 must demonstrate that (1) he has suffered an injury-in-  
2 fact that is both concrete and particularized and  
3 actual or imminent; (2) the injury is traceable to the  
4 defendant's challenged action; and (3) it is likely  
5 that the injury will be redressed by a favorable  
6 decision. City of Sausalito v. O'Neill, 386 F.3d 1186,  
7 1197 (9th Cir. 2004); see also Lujan v. Defenders of  
8 Wildlife, 504 U.S. 555, 560 (1992). However, courts  
9 have been instructed to take a broad view of  
10 constitutional standing in civil rights cases,  
11 especially where, as under the ADA, private enforcement  
12 suits are the primary method of obtaining compliance.  
13 Chapman v. Pier 1 Imports, 631 F.3d 939, 946 (9th Cir.  
14 2011).

15 Here, Plaintiff has alleged that he visited  
16 Defendant's Lake Elsinore store and made purchases  
17 three times on May 9, 2011; May 25, 2011; and May 16,  
18 2012. Kohler Decl. ¶ 5. Plaintiff further states that  
19 during these visits he encountered nine architectural  
20 barriers that violate both state and federal law. Id.  
21 ¶ 8. Under the ADA, a disabled person suffers an  
22 injury-in-fact when discriminatory architectural  
23 barriers deter him from returning or they "otherwise  
24 interfere with his access to" the facility. Chapman,  
25 631 F.3d at 950. In this Action, for each barrier  
26 encountered, Plaintiff has indicated how the barrier  
27 has affected or could affect his access to the facility  
28 in the future. Kohler Decl. ¶ 8. For example,

1 Plaintiff states that when the slope and cross slope of  
2 a disabled parking space exceeds the maximum allowed  
3 under the ADA Accessibility Guidelines ("ADAAG"),<sup>2</sup> it  
4 makes it difficult for him to transfer in and out of a  
5 vehicle. Id. ¶ 8(c). This is sufficient to meet the  
6 injury-in-fact requirement for standing because it  
7 gives rise to a plausible inference that Plaintiff will  
8 be deterred from visiting Defendant's store in the  
9 future. See, e.g. Kohler v. CJP, Ltd., 818 F. Supp. 2d  
10 1169, 1174-45 (C.D. Cal. 2011), Kohler v. Bed Bath &  
11 Beyond of Cal., LLC, No. 11-1246, 2012 WL 2449928 (C.D.  
12 Cal. June 27, 2012). Accordingly, Plaintiff has  
13 constitutional standing to raise his ADA claims.

14 **D. Summary Judgment As To ADA Claims**

15 i. Slope and Cross Slopes of Disabled  
16 Parking Spaces

17 Under the ADA, liability for non-compliance is  
18 assigned to "any person who owns, leases (or leases  
19 to), or operates a place of public accommodation." 42  
20 U.S.C. § 12181(a). Here, the Court finds that  
21 Defendant does not own, lease, or operate the parking  
22 lot at Lake Elsinore Marketplace ("Shopping Center")  
23 and is therefore not liable under the ADA.

24 Accordingly, the Court **DENIES** Plaintiff's Motion and  
25 **GRANTS** Defendant's Cross-Motion for Summary Judgment

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27 <sup>2</sup> The ADA Architectural Guidelines ("ADAAG") are  
28 codified in the Code of Federal Regulations.

1 regarding the slope and cross slopes of the disabled  
2 parking spaces in the Shopping Center.

3 First, Defendant is one of several establishments  
4 that lease store space at the Shopping Center from Lake  
5 Elsinore Marketplace LLC ("Landlord"). Furthermore, it  
6 is undisputed that Defendant does not own the parking  
7 lot at the Shopping Center and Plaintiff does not argue  
8 that Defendant operates the parking lot. Therefore,  
9 the only issue that needs to be addressed is whether  
10 Defendant leases the parking lot for the purposes of  
11 liability under the ADA.

12 Under Defendant's lease agreement with Landlord,  
13 the parking lot is deemed a "Common Area" and is  
14 "available for the joint use and benefit" of Defendant,  
15 other Shopping Center tenants, and customers. Freeman  
16 Decl., Ex. 1. Furthermore, the lease also states that  
17 "Landlord shall operate, maintain, repair and replace  
18 the Common Areas as required by the Lease . . . and  
19 Landlord shall comply with all applicable Legal  
20 Requirements." Id.

21 It is Plaintiff's main contention that Defendant  
22 "leases" the parking lot, and while Landlord may be  
23 jointly liable, Defendant cannot be excused from  
24 responsibility under the ADA. Plaintiff's contention  
25 is misguided. The lease explicitly states that the  
26 parking lot is a common area, which is firmly in the  
27  
28

1 control of Landlord.<sup>3</sup> Plaintiff has supplied no  
2 specific evidence to controvert the contents of the  
3 lease. Accordingly, Landlord is the party responsible  
4 for ADA compliance of the parking lot. Cf. Restatement  
5 (Second) of Property: Landlord & Tenant § 17.3  
6 (landlord liable to tenants and third parties on  
7 portions of property that remain in landlord's  
8 control).

9 Plaintiff relies on Botosan v. Paul McNally Realty  
10 to argue that Defendant cannot contract away its  
11 responsibilities under the ADA. 216 F.3d 827 (9th Cir.  
12 2000). However, Plaintiff's reliance is misplaced.  
13 Plaintiff contends that, under Botosan, a lease  
14 agreement cannot excuse a party from liability under a  
15 civil rights statute. However, Botosan is  
16 distinguishable because in that case it was the  
17 landlord trying escape liability by pointing to lease  
18 provisions handing over responsibility to the tenant.  
19 Id. at 832. The Ninth Circuit held that as an owner of  
20 the public accommodation, the landlord was still  
21 explicitly liable under the ADA, despite the lease  
22

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23 <sup>3</sup> In addition to the language in the lease itself,  
24 this finding is also supported by the definitions of  
25 "lease," "possessory interest," and "common area,"  
26 which are located in Black's Law Dictionary (9th ed.  
27 2009).

1 provisions. Id. at 832-34. Here, Defendant is the  
2 tenant who never owned or had any control over the  
3 parking lot in the first place. Moreover, the lease  
4 between Defendant and Landlord makes clear that  
5 Defendant never accepted any control or responsibility  
6 over the parking lot. Freeman Decl., Ex. 1. Thus,  
7 Defendant is not trying to contract away its  
8 responsibilities and is not liable under the ADA  
9 statute for the parking lot. Therefore, the Court  
10 **GRANTS** Defendant's Cross-Motion for Summary Judgment as  
11 to the disabled parking spaces.

12                   ii.        Slope and Cross Slopes of Access

13                                    Aisles in the Parking Lot

14                   For the same reasons as above, the Court **DENIES**  
15 Plaintiff's Motion and **GRANTS** Defendant's Cross-Motion  
16 for Summary Judgment with regard to the access aisles  
17 in the parking lot. The parking lot, where the access  
18 aisles are located, is a common area which is under the  
19 control of Landlord and not leased by Defendant.  
20 Accordingly, the party responsible for ADA compliance  
21 is Landlord, not Defendant.

22                   iii.        Self-Closing Bathroom Stall Door

23                   The Court finds that Plaintiff's asserted barrier  
24 that the bathroom stall door is not self-closing is  
25 **moot** under the ADA. Regardless of whether or not the  
26 alleged barrier existed at the times that Plaintiff  
27 visited Defendant's store, there is no genuine issue  
28 regarding the fact that the barrier does not exist now.

1 ADAAG § 4.23.4 requires an "outward swinging, self-  
2 closing door" for at least one stall in a public  
3 accommodation restroom. Plaintiff's last visit to the  
4 store was on May 16, 2012. Kohler Decl. ¶¶ 5-7. At  
5 that time, Plaintiff states that the stall door was not  
6 self-closing, attaching photographs for support.  
7 Kohler Decl. ¶¶ 7, 8(g); Ex. B at 9-10. However, more  
8 recently, on June 5, 2012, a service technician hired  
9 by Defendant states that the stall door was equipped  
10 with self-closing hinges, attaching photographs he took  
11 that day. Cerdá Decl. ¶ 3, Ex. 2. In addition,  
12 Defendant's expert, a Certified Access Specialist,  
13 states that he has seen these photographs and can  
14 attest to the fact that the bathroom stall door is  
15 self-closing and ADA compliant. Wood Decl. ¶ 8.  
16 Plaintiff has submitted no evidence to contradict the  
17 fact that on June 5, 2012, the bathroom stall door was  
18 ADA compliant. Plaintiff's only response has been to  
19 object to Defendant's Declarations on the basis of  
20 procedural defects. Therefore, the Court finds that  
21 there is no genuine issue of material fact regarding  
22 the bathroom stall door being self-closing at this  
23 time.

24 Since Plaintiff's asserted barrier does not exist  
25 at this time, Plaintiff cannot obtain relief from this  
26 Court. "Because a private plaintiff can sue only for  
27 injunctive relief (i.e., for removal of the barrier)  
28 under the ADA, a defendant's voluntary removal of

1 alleged barriers prior to trial can have the effect of  
 2 mooting a plaintiff's ADA claim." Oliver v. Ralphs  
 3 Grocery Co., 654 F.3d 903, 905 (9th Cir. 2011).  
 4 Consequently, Plaintiff's ADA claim for the bathroom  
 5 stall door is **moot**. See, e.g. Kohler v. Bed Bath &  
 6 Beyond of Cal., LLC, No. 11-01246, 2012 WL 2449928  
 7 (C.D. Cal. June 27, 2012); Rush v. Fresh and Easy  
 8 Neighborhood Mkt., Inc., No. 10-09304 (C.D. Cal. Dec.  
 9 6, 2011). Therefore, the Court **DENIES** Plaintiff's  
 10 Motion and **GRANTS** Defendant's Cross-Motion for Summary  
 11 Judgment on this issue.

12 Furthermore, the Court rejects Plaintiff's argument  
 13 that his claim is not moot because Defendant is free to  
 14 return to the offending conduct at any time. There is  
 15 no evidence or any reason to suggest that Defendant  
 16 will revert back to non-compliance with the ADA.  
 17 Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S.  
 18 167, 170 (2000) ("A case might become moot if  
 19 subsequent events make it absolutely clear that  
 20 allegedly wrongful behavior could not reasonably be  
 21 expected to recur."). Plaintiff's argument is  
 22 illogical because there is no benefit for Defendant in  
 23 reverting back to non-compliance and doing so would  
 24 actually cost Defendant more than maintaining  
 25 compliance.

26 iv. Strike Side Clearance at Entrance to  
 27 Men's Restroom

28 The Court finds as a matter of law that Plaintiff

1 has not asserted an actionable barrier under the ADA  
2 with regard to the strike side clearance at the door  
3 entering the men's restroom. Accordingly, the Court  
4 **DENIES** Plaintiff's Motion and **GRANTS** Defendant's Cross-  
5 Motion for Summary Judgment on this point.

6 At issue here is whether or not the ADA's  
7 requirements for strike side door clearance refer to  
8 wall space or floor space. For physical structures to  
9 comply with the ADA, they must meet the requirements  
10 set forth in ADAAG. The disputed question of law here  
11 pertains to ADAAG § 4.13.6 and its accompanying  
12 illustration, Figure 25. Section 4.13.6 sets forth the  
13 following:

14

15       **Maneuvering Clearances at Doors.** Minimum  
16 maneuvering clearances at doors that are not  
17 automatic or power-assisted shall be as shown in  
18 Fig. 25. The floor or ground area within the  
19 required clearances shall be level and clear.

20

21       Figure 25 contains diagrams illustrating the  
22 maneuvering clearances required for the two sides of  
23 different kinds of doors and approaches. The diagram  
24 at issue here is part of Fig. 25(a), which pertains to  
25 the pull-side, front approach of swinging doors. The  
26 corresponding note to Fig. 25(a) states the following:

27

28       Front approaches to pull side of swinging doors

1 shall have maneuvering space that extends 18 in  
2 (455mm) minimum beyond the latch side of the door  
3 and 60 in (1525 mm) minimum perpendicular to the  
4 doorway.

5  
6 It is Plaintiff's contention that, based on the  
7 diagram on the left side of Fig.25(a), the ADA requires  
8 eighteen inches of clearance on the strike side wall of  
9 the restroom door. Plaintiff states that right now  
10 there is less than twelve inches of wall space on the  
11 strike side because there is a hallway directly  
12 adjacent to the restroom entrance. Kohler Decl.

13 ¶ 8(a). However, the Court finds that the diagram on  
14 the left side of Fig. 25(a) actually requires eighteen  
15 inches of *clear floor space* on the strike side of the  
16 door, not wall space. Defendant's store has four feet  
17 of clear floor space on the strike side of the restroom  
18 entrance because of the adjacent hallway. Wood Decl.

19 ¶ 5.

20 Just by looking at Fig. 25(a) and the accompanying  
21 notes, there are several indicators that the eighteen-  
22 inch requirement references floor space. First, the  
23 dotted line representing the boundary of clear floor  
24 area is defined by ADAAG. ADAAG § 3.1, Table 1  
25 (Graphic Conventions). However, the solid black line  
26 that appears to represent the wall is not defined. Id.  
27 It is illogical that ADAAG would set requirements for  
28 that undefined solid black line when, in comparison,

1 the dotted line, representing the floor space, has been  
2 clearly defined by the regulations. If the diagram  
3 referred to wall space, ADAAG would have defined the  
4 solid black line. Moreover, the notes accompanying  
5 Fig. 25(a) reference "maneuvering space," which as  
6 Defendant has noted, implies the space needed for a  
7 wheelchair to back up and move forward in order to  
8 navigate through the doorway. See Wood Decl. ¶ 6. It  
9 is unclear how the length of the wall factors into the  
10 need to back up and move forward in a wheelchair.  
11 Also, the word "wall" is absent from Fig. 25(a) and the  
12 accompanying notes. However, the floor area is  
13 explicitly referenced in ADAAG § 4.13.6, which Fig. 25  
14 is attached to. Thus, based on the regulation and  
15 associated diagrams, the Court finds that the eighteen-  
16 inch requirement pertains to clear floor space on the  
17 strike side of the door.

18 Moreover, Defendant supplies expert opinion, from a  
19 Certified Access Specialist, that further supports a  
20 finding that the strike side clearance under ADAAG  
21 § 4.13.6 and Fig. 25 is unrelated to wall length. See  
22 Wood Decl. ¶¶ 5-7. The expert's opinion is based on  
23 experience and several government publications  
24 regarding disabled access including (1) guides published  
25 by the Department of Justice, (2) two California  
26 Building Code manuals, and (3) the United States Access  
27 Board's Scoping and Technical Requirements clarifying  
28 ADAAG § 4.13.6. Id. at Ex. 1-9.

1 Accordingly, the Court finds as a matter of law  
2 that the strike side clearance requirements under ADAAG  
3 § 4.13.6 and Fig. 25 refers to clear floor space, not  
4 wall space. See Kohler v. Bed Bath & Beyond of Cal.,  
5 LLC, No. 11-01246, 2012 WL 2449928, at \*11 (C.D. Cal.  
6 June 27, 2012) (also finding that strike side clearance  
7 under ADAAG § 4.13.6 and Fig. 25 is unrelated to wall  
8 length). Since Plaintiff has made no allegations that  
9 the strike side floor space is in violation of the  
10 ADAAG requirements, the Court **GRANTS** Defendant's Cross-  
11 Motion for Summary Judgment on this issue. Plaintiff  
12 has failed to allege a violation of the ADA regarding  
13 strike side clearance.

### v. Toilet Tissue Dispenser Location

15 The Court also finds that Plaintiff's alleged  
16 barrier regarding the toilet paper dispenser in the  
17 men's restroom is not actionable under the ADA.  
18 Therefore, the Court **DENIES** Plaintiff's Motion and  
19 **GRANTS** Defendant's Cross-Motion for Summary Judgment on  
20 this issue.

21 Plaintiff alleges that the toilet paper dispenser  
22 violates the ADA because the second roll of toilet  
23 paper is further than twelve inches from the front of  
24 the toilet seat. Plaintiff gets this twelve-inch  
25 measurement from the California Building Code. CBC  
26 § 1115(b)(9)(3). However, California law does not  
27 govern Plaintiff's ADA claim. Moreover, under the  
28 ADAAG regulations, restroom stalls do not require a

1 specific measurement from the front of the toilet seat  
2 to the last roll in the dispenser. The requirements  
3 for ADA compliance of toilet paper dispensers in  
4 restroom stalls can be found in ADAAG § 4.16.6.

5

6 **Dispensers.** Toilet paper dispensers shall be  
7 installed within reach, as shown in Fig. 29(b).  
8 Dispensers that control delivery, or that do not  
9 permit continuous paper flow, shall not be used.

10

11 Figure 29(b) only indicates that a toilet paper  
12 dispenser must be a minimum of nineteen inches from the  
13 floor. There is no reference to the distance a toilet  
14 paper dispenser must be from the front of the toilet  
15 seat. See Fig. 29(b). Plaintiff has made no  
16 allegations regarding the height of the toilet paper  
17 dispenser. Accordingly, Plaintiff has not asserted an  
18 actionable barrier under the ADA with regard to the  
19 toilet paper dispenser. See Strong v. Walgreen Co.,  
20 No. 09-611, 2011 WL 5374125, at \*9 (S.D. Cal. Nov. 8,  
21 2011); cf. Kohler v. Bed Bath & Beyond of California,  
22 LLC, No. 11-01246, 2012 WL 2449928, at \*12 (C.D. Cal.  
23 June 27, 2012).

24 vi. Mounting of Paper Towel Dispenser

25 The Court finds that Plaintiff's alleged barrier  
26 regarding the mounting of the paper towel dispenser is  
27 not actionable under the ADA. Plaintiff only alleges  
28 that the paper towel dispenser violates state law,

1 specifically CBC § 1115(b)(9)(2), which requires the  
2 dispenser to be mounted within forty inches of the  
3 floor. Therefore, the Court need not consider this  
4 barrier in the context of Plaintiff's ADA claims.

5 Furthermore, even if the paper towel dispenser  
6 mounting was actionable under the ADA, the Court cannot  
7 consider this barrier because Plaintiff did not assert  
8 it in his Complaint. The Ninth Circuit has held that  
9 in order for a defendant in an ADA action to have fair  
10 notice of a claim under Federal Rule of Civil Procedure  
11 8, a plaintiff must identify all alleged barriers in  
12 the complaint itself. Oliver, 654 F.3d at 909.

13 Accordingly, the Court **DENIES** Plaintiff's Motion  
14 and **GRANTS** Defendant's Cross-Motion for Summary  
15 Judgment on this issue under the ADA.

16 vi. Paper Towel Dispenser Controls

17 The Court finds that Plaintiff's alleged barrier  
18 regarding the paper towel dispenser requiring "tight  
19 grasping, pinching, or twisting of the wrist" is **moot**  
20 under the ADA.

21 ADAAG § 4.27.4 governs the instant issue and states  
22 that "controls and operating mechanisms shall be  
23 operable with one hand and shall not require tight  
24 grasping, pinching, or twisting of the wrist." On May  
25 16, 2012, Plaintiff states that he encountered the  
26 paper towel dispenser at Defendant's store and that it  
27 required tight grasping, pinching or twisting of the  
28 wrist. Kohler Decl. ¶ 7, 8(j); Ex. B at 11. However,

1 a service technician hired by Defendant states that as  
2 of June 21, 2012, there are two paper towel dispensers  
3 in the men's restroom. Jaggli Decl. ¶ 2. One of the  
4 dispensers can be operated with a closed fist, and is  
5 thus ADA compliant. Id. It is clear from the attached  
6 photographs that no tight grasping, pinching, or  
7 twisting of the wrist is required. Id. at Ex. 1.  
8 Also, Defendant's Certified Access Specialist has seen  
9 the service technician's Declaration and the  
10 photographs, and has attested to the dispenser's  
11 compliance with the ADA. Wood Decl. ¶ 11. Plaintiff  
12 has submitted no evidence that contradicts the more  
13 recent observations regarding the paper towel  
14 dispenser. Therefore, the Court finds that there is no  
15 genuine issue of material fact regarding the paper  
16 towel dispenser controls in the men's restroom at this  
17 time.

18 Since Plaintiff's asserted barrier does not exist  
19 at this time, Plaintiff cannot obtain relief from this  
20 Court under the ADA. Thus, Plaintiff's claim regarding  
21 the paper towel dispenser controls is **moot**. See  
22 Oliver, 654 F.3d at 905. Moreover, it cannot  
23 reasonably be expected that non-compliance will recur  
24 because recurrence would cost rather than benefit  
25 Defendant. Friends of the Earth, 528 U.S. at 170. The  
26 Court therefore **DENIES** Plaintiff's Motion and **GRANTS**  
27 Defendant's Cross-Motion on this issue.

28 vii. Insulation of Undersink Pipes

1       As to Plaintiff's asserted barrier that the drain  
2 pipes under the sinks in the restroom lack sufficient  
3 insulation, the Court finds that this claim is also  
4 **moot**.

5       ADAAG § 4.19.4 requires that hot water and drain  
6 pipes under lavatories be "insulated or otherwise  
7 configured to protect against contact." Plaintiff has  
8 submitted a photograph he took on May 16, 2012 of  
9 barely exposed pipes under the sinks in the men's  
10 restroom. Kohler Decl. ¶ 7, 8(i); Ex. B at 9.  
11 However, as with other asserted barriers already  
12 addressed, Defendant submits photographs and  
13 Declarations that indicate that as of a more recent  
14 date, June 5, 2012, this condition does not exist.  
15 There are no exposed pipes underneath the sinks. Cerdá  
16 Decl. ¶ 2, Ex. 1.; Wood Decl. ¶ 12. Plaintiff has  
17 submitted no evidence contradicting the more recent  
18 observations regarding the pipes in the restroom.  
19 Therefore, the Court should find that there is no  
20 genuine issue of material fact that as of June 5, 2012,  
21 the insulation on the pipes underneath the sinks are  
22 ADA compliant.

23       Since Plaintiff's asserted barrier does not exist  
24 at this time, Plaintiff cannot obtain relief from this  
25 Court under the ADA and Plaintiff's claim is **moot**. See  
26 Oliver, 654 F.3d at 905. Furthermore, it cannot  
27 reasonably be expected that non-compliance will recur  
28 because, again, there is no conceivable benefit to

1 Defendant in returning to non-compliance. Friends of  
2 the Earth, 528 U.S. at 170. Instead, recurrence would  
3 likely cost Defendant. The Court thus **DENIES**  
4 Plaintiff's Motion and **GRANTS** Defendant's Cross-Motion  
5 for Summary Judgment on this issue.

6 ix. Strike Side Clearance at Men's  
7 Restroom Exit

8 As to Plaintiff's final asserted barrier, regarding  
9 the strike side clearance at the door when exiting the  
10 men's restroom, the Court finds that Plaintiff has not  
11 asserted an actionable barrier under the ADA.  
12 Accordingly, the Court **DENIES** Plaintiff's Motion and  
13 **GRANTS** Defendant's Cross-Motion for Summary Judgment on  
14 this issue.

15 The previous analysis regarding the strike side  
16 clearance at the entrance of the men's restroom applies  
17 to this alleged barrier as well. Plaintiff again cites  
18 to ADAAG § 4.13.6 and Fig. 25 arguing that the  
19 requirements refer to wall space. However, as already  
20 stated, the strike side clearance requirements under  
21 ADAAG § 4.13.6 and Fig. 25 set minimum dimensions for  
22 *clear floor space, not wall space*. Since Plaintiff has  
23 made no allegations regarding the floor space violating  
24 the strike side clearance requirements, Plaintiff has  
25 not asserted an actionable barrier under the ADA.

26 In summary, the Court **DENIES** Plaintiff's Motion and  
27 **GRANTS** Defendant's Cross-Motion for Summary Judgment on  
28 all of Plaintiff's ADA claims.

1                   **E. Plaintiff's State Law Claims**

2                   The only basis of jurisdiction over Plaintiff's  
3 state law claims is supplemental. The Court's original  
4 jurisdiction over this Action was based on federal  
5 question jurisdiction pursuant to Plaintiff's ADA  
6 claims.<sup>4</sup> Since the Court has granted Defendant's Cross-  
7 Motion for Summary Judgment on all of Plaintiff's ADA  
8 claims, the only claims remaining now are the state law  
9 claims under the Unruh Act and CDPA.

10                  Moreover, the Court has authority to decline to  
11 exercise supplemental jurisdiction over these state  
12 claims because it "has dismissed all claims over which  
13 it has original jurisdiction." 28 U.S.C. § 1337(c).  
14 The Supreme Court has held that supplemental  
15 jurisdiction is discretionary and that "needless  
16 decisions of state law should be avoided both as a  
17 matter of comity and to promote justice between the  
18 parties." United Mine Workers of America v. Gibbs, 383  
19 U.S. 715, 726 (1966). Here, to adjudicate the  
20 remaining state claims would require knowledge of the  
21 California Building Code, the California Health &  
22 Safety Code, and other state laws and regulations. A  
23 state court would be a better venue for these issues.  
24 Therefore, the Court declines to exercise supplemental

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25  
26                  <sup>4</sup> Neither party has asserted any facts to support  
27 diversity jurisdiction, and it appears that both  
28 Parties are citizens of California.

1 jurisdiction and **DISMISSES** Plaintiff's state law claims  
2 **without prejudice**. See, e.g. Kohler v. Bed Bath &  
3 Beyond of Cal., LLC, No. 11-01246, 2012 WL 2449928  
4 (C.D. Cal. June 27, 2012); Rush v. Fresh and Easy  
5 Neighborhood Mkt., Inc., No. 10-09304 (C.D. Cal. Dec.  
6 , 2011).

7 **IV. CONCLUSION**

8 The Court hereby **OVERRULES** all of Plaintiff's  
9 Evidentiary Objections and **DENIES** Defendant's Requests  
10 for Judicial Notice. The Court also **DENIES** Plaintiff's  
11 Motion for Summary Judgment. In addition, for the  
12 above stated reasons, the Court **GRANTS** Defendant's  
13 Cross-Motion for Summary Judgment as to Plaintiff's ADA  
14 claims. The Court **DISMISSES without prejudice**  
15 Plaintiff's remaining state law claims.

16  
17 **IT IS SO ORDERED.**

18 DATED: July 23 , 2012.

19 RONALD S.W. LEW  
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21 **HONORABLE RONALD S.W. LEW**  
Senior, U.S. District Court Judge  
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